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In the Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH, PETITIONER

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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APP

QUESTIONS PRESENTED

1. Whether the Attorney General may delegate his litigation authority by regulation to an independent counsel he appoints, if he retains the authority to rescind the regulation.

2. Whether the failure to execute duplicative appointment documents and oaths for the assistants to the Independent Counsel defeats their authority to perform, under the Attorney General's regulations, the same functions they are already performing under the independent counsel provisions of the Ethics in Government Act.

3. Whether, in light of the Attorney General's parallel appointment of respondent as Independent Counsel, the district court and the court of appeals correctly declined to reach the merits of petitioner's constitutional challenge to the independent counsel provisions of the Ethics in Government Act.

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INTEREST OF THE UNITED STATES

Petitioner is challenging the authority of Independent Counsel Lawrence E. Walsh to conduct the "Iran/Contra" probe. The Independent Counsel is conducting his investigation under two separate grants of authority: an appointment made by a court pursuant to the Ethics in Government Act of 1978 (Ethics Act), Tit. VI, 28 U.S.C. (& Supp. III) 591 *et seq.*, and an appointment made by the Attorney General pursuant to regulations that the Attorney General has promulgated, 28 C.F.R. 600.1-600.5, 601.1.[1]

The United States is in complete accord with the goal underlying the independent counsel provisions of the

[1] Since the time of respondent's appointment, the independent counsel provisions of the Ethics Act have been replaced by new, substantially similar legislation. See Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191. The prior version of the statute continues to govern this case. See 28 U.S.C. 598.

Ethics Act: to assure integrity in the investigation and, where appropriate, prosecution of violations of law by high-level officials of the Executive Branch. At the same time, however, we note that serious questions regarding the constitutionality of these provisions have cast a cloud over investigations conducted pursuant to that authority.[2]

In order to ensure that the "Iran/Contra" investigation would go forward unhampered by these unresolved constitutional questions, the Attorney General made a parallel appointment of respondent to a position within the Executive Branch and empowered him to conduct his investigation under the authority of that appointment. The Attorney General made the parallel appointment by first establishing by regulation the "Office of Independent Counsel: Iran/Contra" within the Department of Justice. He then appointed respondent as Independent Counsel in charge of that Office, vesting him with the responsibility to investigate the same activities that respondent is authorized to investigate under the auspices of the Ethics Act. See Pet. App. 53a-62a; 28 C.F.R. 600.1-600.5, 601.1; 52 Fed. Reg. 7270-7273, 9241 (1987).

The United States has an interest in defending the validity of the Attorney General's regulations and the separate appointment of respondent as Independent Counsel within the Justice Department pursuant to those regulations. The district court and the court of appeals have upheld the validity of that appointment. Because the regulations promulgated by the Attorney General empower respondent to proceed with the same investigative and prosecutorial activities that are authorized under the Ethics Act, it is our view that there is no need for this Court to reach the separate issue of the constitutionality of the Ethics Act in this case.

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[2] The Executive Branch has recently argued as amicus curiae in *In re Sealed Case*, No. 87-5261 (D.C. Cir. argued Sept. 16, 1987), that these provisions are unconstitutional.

STATEMENT

1. On December 4, 1986, the Attorney General applied for the appointment of an Independent Counsel under the Ethics Act, 28 U.S.C. 591(c), to investigate potential criminal violations involved in the transfer of arms to Iran and the disposition of the proceeds from that transfer. In accordance with that application, a Special Division of the United States Court of Appeals for the District of Columbia Circuit (see 28 U.S.C. 49) appointed respondent as Independent Counsel under the Ethics Act on December 19, 1986, to investigate the matter (Pet. App. 3a).

On February 24, 1987, petitioner filed a civil action in federal district court seeking to enjoin the investigation. Petitioner alleged that the independent counsel provisions of the Ethics Act violate the separation of powers doctrine by infringing the prerogatives of the Executive Branch. In response, on March 5, 1987, the Attorney General by regulation created within the Department of Justice the "Office of Independent Counsel: Iran/Contra." That office was given the authority to investigate the same activities that are subject to the investigation proceeding under the Ethics Act. The Attorney General appointed respondent to the position of Independent Counsel under the regulations. Pet. App. 4a-6a.

The Attorney General exercised that authority in part because, as he explained, "[t]he President has made clear that he supports a full investigation into the events that the Independent Counsel has been charged with investigating under that Act * * * [and, in] light of the President's views, I have found it advisable to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the *North* litigation." Pet. App. 76a.

The Attorney General emphasized that this separate appointment was in no way "meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." To the contrary, the appointment was "intended to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." Pet. App. 76a-77a. To meet that objective, the Attorney General explained that he was issuing the new regulations under the authority vested in him pursuant to "28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution." Pet. App. 76a, 77a.

The regulations vest the Independent Counsel, with respect to all matters in his prosecutorial jurisdiction, with the "full power and independent authority to exercise all investigative and prosecutorial functions" of the Department of Justice and the Attorney General, with the exception of matters requiring the Attorney General's personal attention under 18 U.S.C. (& Supp. III) 2516. Pet. App. 78a. The Independent Counsel's powers include, among other activities, conducting grand jury proceedings, applying for grants of immunity, signing indictments, initiating prosecutions, and conducting all necessary civil and criminal litigation. *Id.* at 78a-79a.

In addition, the Attorney General's regulations empower the Independent Counsel "to appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary" (Pet. App. 80a). The regulations specify that the Independent Counsel shall, "except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws" (*id.* at 81a). The Attorney General's regulations also provided that, as under the Ethics Act, the Independent Counsel can be re-

moved on circumscribed grounds only. With respect to the Iran/Contra investigation, the regulations authorize respondent to investigate the same matters that were assigned to him under the Ethics Act. *Id.* at 82a-83a.

2. Respondent accepted the appointment by the Attorney General on March 5, 1987. He appointed associates to assist him, and since then has been actively conducting an investigation of the "Iran/Contra" matter. All of the associates he appointed to assist him in performing his duties under the regulations were individuals he had appointed to assist him in performing his duties under the Ethics Act. Each of the associates signed an oath of office at the time he began assisting respondent with his duties under the Act. The associates did not sign separate oaths of office in connection with their duties under the regulations (Pet. App. 48a).

Subsequent to respondent's appointment by the Attorney General, the grand jury investigating the Iran/Contra matter issued a subpoena to petitioner. Petitioner refused to comply with the subpoena and was accordingly held in contempt by the federal district court that was supervising the grand jury. Pet. App. 7a. On appeal of the contempt order, the court of appeals ruled that petitioner's challenge to the validity of respondent's status as prosecutor was ripe. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). It remanded the matter to the district court for a determination of whether respondent's parallel appointment by the Attorney General made it unnecessary to reach the constitutional challenges petitioner wished to raise against respondent's status under the Ethics Act (Pet. App. 66a-75a).

3. On remand, the district court ruled that the Attorney General's parallel appointment of respondent is valid, and that appropriate authority has been vested in respondent and his assistants (Pet. App. 42a-51a). The district court found that the Attorney General has the

authority to create, by regulation, independent counsels and to grant them the degree of independence established under the regulations (*id.* at 45a-46a). The court also ruled that respondent's appointment by the Attorney General is to a position within the Department of Justice, and that the appointment is consistent with the terms of the Ethics Act (*id.* at 47a-48a). Finally, the district court determined that the authority to conduct criminal proceedings has been properly vested in respondent's assistants. In light of the "unique set of circumstances" posed here, the court found that the affidavits that the assistants had signed accepting appointment under the Ethics Act were sufficient to meet any technical appointment requirements under the regulations. *Id.* at 47a-49a.

4. On the second appeal, the court of appeals affirmed the district court's holding (Pet. App. 27a). The court of appeals upheld the statutory authority of the Attorney General to delegate authority as he did here, and it confirmed that respondent's office under the regulations is part of the Department of Justice (*id.* at 11a-12a). The court also ruled (*id.* at 12a-14a) that the Attorney General's action was constitutionally valid. Rejecting petitioner's challenges to the appointment, the court held that the regulations properly created respondent's position as an "inferior Officer" of the United States, since the regulations (and respondent's authority under them) can, "[s]ubject to generally applicable procedural requirements," be rescinded by the Attorney General "at any time." *Id.* at 13a.

The court also rejected petitioner's argument that respondent's assistants had not properly been appointed to their offices. It agreed with the district court that, under the particular circumstances posed here, requiring the assistants to take oaths and complete forms essentially duplicating those executed under the Ethics Act would serve no purpose. Pet. App. 15a-17a. The court of appeals

also found that respondent and his assistants had been "specifically directed" by the Attorney General to perform the tasks assigned to them, as is required by 28 U.S.C. 515(a) (Pet. App. 17a-19a).

Finally, the court of appeals found that no aspect of respondent's tenure under the Attorney General's regulations and under the Ethics Act required the court to reach the constitutional challenges made by petitioner against the Act (Pet. App. 20a-27a). The court concluded that the fact of potential judicial review of any removal under the Ethics Act does not have a sufficient current impact on respondent to justify adjudication of the constitutional issues petitioner wishes to raise (*id.* at 22a-23a).[3]

ARGUMENT

The nub of the controversy in this case is whether the courts should address in this litigation the constitutional challenges that petitioner wishes to make against respondent's authority under the Ethics Act to investigate and, if appropriate, prosecute him. The Attorney General appointed respondent to a parallel position within the Department of Justice in order to make it possible for the Iran/Contra investigation to proceed without the threat of disruption by a successful constitutional challenge to the Ethics Act.[4] In light of the Attorney General's appoint-

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[3] In partial dissent, Judge Williams took the view that because the Attorney General could rescind the regulations at any time, respondent's tenure under the regulations is different from his tenure under the Ethics Act (Pet. App. 28a-31a). Therefore, Judge Williams concluded, the court of appeals was required to reach the merits of petitioner's constitutional challenges to the Ethics Act (*id.* at 32a-41a).

[4] There is a case currently pending in the court of appeals that raises the question of the constitutionality of the Ethics Act. *In re Sealed Case*, No. 87-5261 (D.C. Cir. argued Sept. 16, 1987). The constitutional issue is before the court in that case because the Independent

ment, respondent currently has two independent grants of authority to investigate petitioner, the Ethics Act and the Attorney General's regulations. Only if the appointment under the regulations is invalid would it be necessary to consider the substantial constitutional questions posed by the Ethics Act. We submit that the regulations and respondent's appointment are valid and that it is therefore both proper and advisable for the Court to decline petitioner's invitation to address the difficult constitutional questions raised by the Ethics Act. See *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985); *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

1. Petitioner first challenges the constitutionality of the Attorney General's regulations (Pet. 9-16). He bases his claim on the assumption that a decision by the Attorney General to rescind the independent counsel regulations would be reviewable on the merits in court. If that is so, petitioner claims, the Independent Counsel is sufficiently free from the Attorney General's control that he cannot be considered an "inferior Officer" within the meaning of the Constitution. In other words, petitioner's claim is that the Attorney General has by error created an office that is independent to such an extent that its occupant must be appointed by the President with the approval of the Senate. See U.S. Const. Art. II, § 2, Cl. 2.

Contrary to the premise of petitioner's argument, rescission of the Attorney General's regulations creating the "Office of Independent Counsel: Iran/Contra" would not be reviewable under the Administrative Procedure Act, because the matter has been committed to the Attorney General's discretion by law. See 5 U.S.C. 701(a)(2). First, as Judge Williams pointed out in his concurring opinion

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Counsel conducting that investigation declined to accept the Attorney General's offer of a parallel appointment, an offer that the Justice Department has made to all Independent Counsels now serving under the authority of the Ethics Act.

below (Pet. App. 29a), prosecution decisions made by the Executive are "presumptively unreviewable" (*Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)), and are committed to the Executive's discretion, with only the most modest constraints. *Wayte* v. *United States*, 470 U.S. 598, 607 (1985). Second, Congress has accorded the Attorney General the authority to delegate his responsibilities, to appoint assistants, to appoint persons to assist the United States attorneys, and to appoint persons to conduct investigations of criminal and other matters. See 28 U.S.C. (& Supp. III) 510, 515-519, 533, and 543. Congress has not imposed any substantive restrictions on the Attorney General's authority to assign such duties to others and to terminate those assignments; accordingly, there is no "law to apply" that would provide the courts with a basis for reviewing the Attorney General's decisions on such matters, including his decision to make a delegation by regulation or to revoke the delegation by rescinding the regulation. See *Chaney*, 470 U.S. at 833-834.[5]

2. Petitioner next argues (Pet. 17-23) that the technical requirements for authorizing attorneys to conduct federal investigations and prosecutions were not met in this case.

The district court and the court of appeals determined that respondent's assistants were not required to execute essentially duplicative oaths and forms in order to carry out the same functions within the Justice Department under the Attorney General's regulations that they were

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[5] If rescission of the regulation is reviewable, that would suggest that its promulgation was also reviewable. See *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-42 (1983). Yet it is clear that there is no basis to review the issuance of such a regulation.

We note in addition that this Court has upheld the exercise of similarly independent investigative authority by an officer created by the Attorney General's regulation, without in any way suggesting that the Attorney General's delegation was unconstitutional. *United States* v. *Nixon*, 418 U.S. 683 (1974).

already performing under the Ethics Act (Pet. App. 15a-20a, 48a-49a). The reasoning used by both courts is correct and is in no way in conflict with the rulings in the two appellate cases cited by petitioner (Pet. 22), which upheld delegations of authority to federal prosecutors. *United States* v. *Prueitt*, 540 F.2d 995, 1000-1001 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977); *In re Persico*, 522 F.2d 41, 56-67 (2d Cir. 1975). The issue in those cases was whether particular attorneys had been properly appointed and "specifically directed" (28 U.S.C. 515(a)) to perform particular tasks. The courts found that the attorneys had been properly designated and directed.

Nothing in the two court of appeals decisions on which petitioner relies suggests that respondent's assistants cannot serve in the "Office of Independent Counsel: Iran/Contra" without further direction from the Attorney General or without executing a new oath following respondent's appointment to that Office. The court of appeals properly held that the specific direction provided to the Independent Counsel under the Attorney General's regulations was sufficient to satisfy the requirement of 28 U.S.C. 515(a) that the attorneys assisting the Independent Counsel be "specifically directed" to perform certain Executive Branch functions. Pet. App. 17a-19a. That is particularly true in view of the fact that the purpose of the "specifically directed" provision was not to protect criminal defendants and prospective defendants, but to protect the government against the risk that specially appointed attorneys would engage in activities beyond the scope of their intended commissions. For that reason, the provision has traditionally been given a liberal construction in favor of the validity of the executive action at issue. See *United States* v. *Balistrieri*, 779 F.2d 1191, 1207-1210 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986); *United States* v. *Prueitt*, 540 F.2d at 1002-1003; *In re Persico*, 522 F.2d at 58-63; *Wall* v. *United States*, 384 F.2d 758, 763

(10th Cir. 1967); *United States* v. *Denton*, 307 F.2d 336, 338 (6th Cir.), cert. denied, 371 U.S. 923 (1962); *Shushan* v. *United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941).

Beyond that, the regulations authorize the Independent Counsel to appoint and assign the duties of such employees as he deems necessary to perform his designated functions. 28 C.F.R. 600.1(c). The Attorney General is authorized by statute to delegate his functions to others within the Department of Justice (28 U.S.C. 510) including his responsibility to appoint and "specifically direct[]" the activities of special attorneys. The Attorney General has previously delegated those responsibilities with respect to special attorneys performing services within other components of the Department. See 28 C.F.R. 0.13, 0.15(b)(1)(ii). The assignment to the Independent Counsel of the responsibility for appointing and assigning attorneys to assist him constitutes a permissible delegation of the Attorney General's responsibility under Section 515(a), and thus satisfies the requirement that special attorneys be "specifically directed by the Attorney General" to perform the tasks assigned to them.

The court of appeals was also correct in concluding that the failure of respondent's assistants to take a new oath of office after respondent's appointment by the Attorney General does not render unlawful their service under the authority of the Attorney General's regulations. Because the Independent Counsel's responsibilities under the Ethics Act and under the Attorney General's regulations are identical, the oaths of office taken by respondent's assistants pursuant to their appointments under the Ethics Act are substantively identical to the oaths they would have taken under the Attorney General's regulations. Under those circumstances, where the responsibilities of the two offices are entirely congruent, the court of appeals properly declined to invalidate the appointment of respondent's

assistants under the Attorney General's regulations on the ground that they failed to execute a duplicate oath of office in connection with their duties under the regulations.

3. Finally, petitioner contends (Pet. 23-27) that the court of appeals erred by not addressing his attacks on the validity of the Ethics Act, because of the allegedly different tenure provisions for respondent under the regulations and under the Ethics Act.

The tenure provisions in the two schemes are essentially the same; the difference between them arises from the fact that the Attorney General can rescind the regulation, thereby eliminating the regulatory tenure provision, while under the Ethics Act the Attorney General's decision to remove an independent counsel is subject to review by the Special Division of the court of appeals. 28 U.S.C. (& Supp. III) 596(a)(3). Petitioner argues that in light of this distinction, the court of appeals was wrong in ruling that petitioner's constitutional challenges are not ripe, and that the court's ruling is at odds with this Court's decision in *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986).

This case is not like *Bowsher*. The question there was whether the Comptroller General, who is removable by Congress, can carry out Executive Branch functions. The Court held that an officer's removability by one Branch prevents the officer from exercising the functions of another Branch, because the fact of removability "dictate[s] that he will be subservient to" the Branch with the removal power (slip op. 14). For that reason, the Court found that the issue of removability was critical to the question of the constitutionality of the statute at issue in the case, even though no steps had been taken to remove the Comptroller General.

Unlike the situation with the statute at issue in *Bowsher*, the hypothetical removability of the Independent Counsel under the Attorney General's regulations does not affect the constitutionality of those regulations and the In-

dependent Counsel's appointment under them. The person who would remove the Independent Counsel—either under the terms of the regulations or by rescinding them—would be the Attorney General, a member of the same Branch as the Independent Counsel. The constitutional flaw that was present in *Bowsher*—the fact that an officer performing functions for one Branch was removable by representatives of another Branch—is therefore not present in the case of the Attorney General's regulations. Because the Attorney General's regulations provide a valid basis for the Independent Counsel's exercise of prosecutorial and investigative authority—at least unless and until the Independent Counsel is removed by the Attorney General—the Ethics Act is simply an alternative basis for the Independent Counsel's exercise of authority.

Petitioner's argument appears to be that in spite of the Attorney General's parallel appointment—and even assuming that the parallel appointment is valid—the existence of respondent's appointment under the Ethics Act is sufficient to poison respondent's status by making him and his assistants beholden to the Judicial Branch. For that reason, petitioner contends, it was improper for the court of appeals to decline to reach the question of the constitutionality of the Ethics Act.

The answer to this contention is that the Attorney General's appointment renders the Ethics Act appointment superfluous and thus makes the question of the constitutionality of the Act unnecessary to the resolution of this case. Even if the court of appeals had addressed the issue of the constitutionality of the Act, the outcome of the case would have been the same: because of respondent's separate appointment under the Attorney General's regulations, petitioner would still be compelled to comply with respondent's subpoena and would still be properly subject to contempt for failing to do so. The only

consequence of requiring the court of appeals to resolve the difficult constitutional questions presented by the Ethics Act would be to cause a substantial delay in the disposition of the subpoena controversy.

The fallacy in petitioner's argument becomes clear by the use of a simple example. Suppose the Ethics Act permitted the court to appoint a sitting United States Attorney as an independent counsel. Suppose futher that the court appointed a United States Attorney as the independent counsel to investigate a particular matter, which the United States Attorney was already investigating in his capacity as a Department of Justice official. Would the Ethics Act appointment render the United States Attorney "subservient to" the Judicial Branch, so that a constitutional flaw in the Ethics Act would invalidate the performance of his duties as a United States Attorney? We think not. The United States Attorney would be entitled to continue his investigation because of his status as an Executive Branch official, regardless of any constitutional infirmity in the Ethics Act. And because the validity of the investigation would not be affected by the resolution of the constitutional issue, there would be no reason for the courts to reach out to decide that issue if it were raised by a target of the investigation.

The same analysis applies to the Independent Counsel, who has been validly authorized to conduct an investigation within the Department of Justice, regardless of the constitutionality of his appointment under the Ethics Act. It is therefore unnecessary and inappropriate to address the constitutionality of the provisions of that Act in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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